NO. 47871-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARY YOKEL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Nelson Hunt, Judge

BRIEF OF APPELLANT

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2. The trial court violated Article 1, section 22, of the Washington Constitution when it refused to let Ms. Yokel introduce evidence that the single hydrocodone pill found in her pocket was obtained pursuant to her minor daughter's valid prescription.

3. The trial court misinterpreted RCW 69.50.4013(1) when it concluded that the family member of a person who has been prescribed a controlled substance may not lawfully possess that substance.

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5. The prosecutor committed misconduct during closing argument by asking the jury to infer guilt from Ms. Yokel's court-ordered silence about her daughter's prescription.

6. The community custody condition prohibiting Ms. Yokel from possessing or consuming "non-prescribed mood altering substances" is

unconstitutionally vague under Article 1, Section 3, of the Washington Constitution and the Fourteenth Amendment of the United States Constitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court violate the Sixth Amendment and Article 1, section 22, when it refused to let Ms. Yokel present testimony or evidence that the single hydrocodone pill found loose in her pocket was obtained pursuant to her minor daughter's prescription and when it refused to instruct the jury according to Ms. Yokel's planned defense?

2. Did the prosecutor commit misconduct during closing argument by asking the jury to infer guilt from Ms. Yokel's court-ordered silence about her daughter's prescription?

3. Is the community custody condition prohibiting Ms. Yokel from possessing or consuming non-prescribed mood altering substances unconstitutionally vague?

C. STATEMENT OF THE CASE

On February 15, 2015, Centralia police officer Buddy Croy was on patrol near the Peppertree Motel in Centralia. RP2 90.[1] He noticed

[1] The verbatim report of proceedings contains four volumes. RP1 refers to the volume containing the verbatim report of proceedings for July 1, 2015 (motion hearing); RP2 refers to the volume containing the verbatim report of proceedings for July 16, 2015; RP3 refers to the volume containing the verbatim report of proceedings for July 17, 2015. The remaining volume will not be cited.

someone standing in the doorway of one of the motel rooms. RP2 91. The person closed the door quickly in a suspicious way when the police car went by. RP2 91. He ran the license plate for the car parked in front of that room and discovered the car belonged to Ms. Yokel; he also learned she had an outstanding warrant for third-degree Driving with a Suspended License. RP2 91.

He called for backup, and he and Sergeant Stacy Dunham knocked on the motel room door. RP2 93, 118-19. One of the occupants opened the door, and the officers saw Ms. Yokel sitting inside the room on a bed. RP2 93. He told Ms. Yokel he had a warrant for her arrest and asked her to walk over to him. RP2 94. As she walked over, Ms. Yokel made a gesture indicating to the officers she had dropped or discarded something. RP2 94-95, 120-21. But neither office saw anything in her hand or anything drop from her hand. RP2 115, 124. When she came to the door, Officer Croy handcuffed her, and Sergeant Dunham took her to a patrol car. RP2 95-96.

Later, Officer Croy found a glass pipe on the motel room floor near where Ms. Yokel had been was standing. RP2 97, 99, 121. He did not send the pipe off for fingerprints or DNA testing and so did not know whether Ms. Yokel had handled or used the pipe. RP2 110-11. The pipe later tested positive for methamphetamine residue. RP2 135, 139.

When Officer Croy returned to his patrol car, he searched Ms. Yokel incident to arrest. RP2 103. During the search, he found a single prescription pill in Ms. Yokel's coat pocket that tested positive for hydrocodone. RP2 104, 154.

Ms. Yokel was charged with one count of possession of a controlled substance (methamphetamine) relating to her alleged possession of the glass pipe. CP 1. The jury found her not guilty on this count, and it is not at issue in this appeal. CP 4. She was also charged with one count of possession of a controlled substance (hydrocodone) under RCW 69.50.4013(1) for her alleged possession of the pill. CP 2.

Ms. Yokel's planned defense to Count 2 was that she had a valid prescription for her then 16-year-old daughter. RP2 6-9, 16. She planned to have her daughter testify that the pill was in her pocket because she had taken out an extra pill when helping administer the medication:

> My understanding of the facts is that on the day in question, she, my client, had taken two of the pills out of the medicine bottle for her daughter's prescription medication. She has a medical condition, and she gave one to her daughter, didn't think she should take two, put the other one in her pocket and had it in her pocket ultimately when the police arrested her.
>
> It's my understanding the daughter would testify that that happened, that she has this medical condition, the prescription is hers, and her mom was regulating the medication she takes so she takes it as needed.

So that's essentially the offer of proof.

RP2 6-9.

However, Ms. Yokel's daughter was not able to come to court on the trial date because of her school schedule. RP2 6, 8-9. And Ms. Yokel's lawyer had not been able to contact or subpoena Ms. Yokel's daughter because he had an incorrect phone number for his client. RP2 6, 8-9. Ms. Yokel therefore asked the court for a continuance. RP2 6.

The state opposed the continuance. RP2 7. In its view, "there was no evidence at all that any of the daughter's testimony would be exculpatory to the defendant. As far as we know, she really has nothing to say at all related to this case." RP2 7. Furthermore, the state argued that the daughter's testimony that she had a prescription for the same medicine "is not even really relevant to this case." RP2 7. For these reasons, in its view, there was no reason to delay the trial to allow Ms. Yokel's daughter to testify. RP2 8.

The court accepted the state's argument. It stated that "it is a crime to possess [hydrocodone] without a prescription, and [Ms. Yokel] possessed it without a prescription, so what you're asking the jury to do under that circumstance is let's just ignore the law and apply it selectively only to those people to whom it applies but we don't like." RP2 9-10. The court cut off Ms. Yokel's lawyer's response, faulting him for "lack of

diligence in not subpoenaing this witness." RP2 10. The court refused to grant a continuance. RP2 10.

In addition to opposing testimony from Ms. Yokel's daughter, the state also moved in limine to exclude any mention of her prescription for hydrocodone:

> At this point our request is that there be no mention essentially of this prescription. *It's not a defense, as the court has already noted this morning, to have a prescription for someone else, especially when this someone else won't be here.* I don't think that the defendant can provide the proper foundation or authentication for that. Any knowledge that she would have about that prescription would be based on hearsay.
>
> And so at this point we're asking it be excluded, one, under 901 for lack of foundation and authentication. We're also asking it be excluded as irrelevant.

RP2 15 (emphasis added).[2]

In response, Ms. Yokel argued that this case raised a novel legal question, namely, whether a parent who administers prescription medicine to a minor child has committed a crime merely by possessing the

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[2] In its written motion, the state moved the court as follows:

> 1. To exclude evidence of a third-party's prescription. Evidence that a third-party had a prescription for a controlled substance is not relevant as to the Defendant's possession of that controlled substance. ER 402. Further, evidence of the prescription should be excluded unless the Defendant can provide adequate foundation and authentication for the prescription. ER 901.

Supplemental Designation of Clerk's Papers, State's Motions in Limine (sub. nom. 32)

medicine. RP2 15-17. He noted that the legislature had not resolved this question. RP2 16. Ms. Yokel's lawyer had the prescription with him in court and said that, if Ms. Yokel's daughter would not be allowed to testify, his client could personally authenticate the prescription. RP2 16. He reiterated that his client "would like to be able to put on the defense that she had a valid prescription for her minor daughter." RP2 17.

The court granted the state's motion to exclude any mention of the prescription:

> Well, you're not going to be allowed to, because the circumstances here are totally different than having the pill in the bottle and having the minor present or close. That's what that is designed for. You're allowed to do that for a minor.
>
> But you don't take the pill out of the bottle, put it in your pocket, or wherever this was discovered, and then go along possessing methamphetamine and in a motel room where the daughter is not present.
>
> So the circumstances that you outline, yeah, maybe I would allow that as a defense if it were the police broke down the door just as she was handing the medicine to her daughter at the appropriate time, and then maybe we would—you'd be able to present that, but not under the circumstances here. Just because there is some circumstance under which it might be a legitimate defense does not mean that it's a legitimate defense under the facts as going to be presented here.
>
> So no. I'm granting the motion in limine, and that includes jury selection, cross examination and also direct testimony. That may also resolve the issue of whether the daughter should be here to testify.

> Any mention of a prescription is out other than it'[s] a prescription drug and there was no prescription for it for her. If that should be asked, that's an appropriate question, but anything about, "Well, I have a prescription for my daughter," no. All right.

RP2 17-18.

During the state's case-in-chief, police officers and other witnesses testified consistently with the facts described above. Ms. Yokel testified in her own defense. RP2 159. She said she had never touched the glass pipe and did not drop anything in the motel room while approaching the officers. RP2 160. She believed the pill officers found was a Vicodin and did not know it contained hydrocodone. RP 162. The defense rested.

Ms. Yokel then asked the court to give WPIC 52.02 (Controlled Substance Obtained Directly from a Practitioner or Pursuant to a Valid Prescription). That instruction provides:

> A person is not guilty of the crime of possession of a controlled substance if the substance was obtained directly from or pursuant to a valid prescription or order of a practitioner.
>
> The defendant has the burden of proving by a preponderance of the evidence that the substance was obtained directly from or pursuant to a valid prescription or order of a practitioner. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not.

Supplemental Designation of Clerk's Papers, Defendant's Proposed Instructions (sub. nom. 36). However, the court denied her request because "there's no evidence to support it in any event, but there's no evidence because I ruled [any evidence of Ms. Yokel's daughter's prescription] was inadmissible." RP2 173-74. Ms. Yokel timely objected. RP3 182.

During closing arguments, the state called attention to the fact that Ms. Yokel never explained on the stand how she obtained the hydrocodone pill, and it asked the jury to infer guilt from that absence of testimony:

> Again, with the defendant telling you she had that pill, the lab tech telling you it was hydrocodone, it's her burden to prove to you by a preponderance of the evidence, more likely than not, that she didn't know that the controlled substance had something, *she didn't explain to you why she had the pill, anything. She just said I had this pill in my [pocket], it was hydrocodone -- or it was Vicodin*. I believe it was Vicodin. That's her burden. The state doesn't have to do anything with that. That's on her to prove.

RP3 214-15 (emphasis added).

The jury found Ms. Yokel guilty of Count 2, possession of a controlled substance (hydrocodone). Ms. Yokel was sentenced to 3 months in jail (she was permitted to serve this time on electronic home monitoring) and 12 months of community custody. CP 8-10. The court imposed various community custody conditions, including the following, handwritten condition: "Do not possess or consume alcohol or other non-

prescribed mood altering substances." CP 10. Ms. Yokel did not object to this condition during sentencing.

Ms. Yokel timely filed a Notice of Appeal. CP 16.

D. ARGUMENT

1. The trial court denied Mary Yokel her right to present a defense.

The Sixth and Fourteenth Amendments guarantee an accused person the right to meaningful opportunity to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). Article I, section 22,[3] of the Washington Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Consistent with these rights, a defendant is entitled to examine witnesses against him and to offer testimony. "The right to confront and

[3] Article 1, section 22, of the Washington Constitution provides: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases …."

cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions." *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967)). A defendant is also entitled to have the jury instructed on her theory of the case, to the extent the theory is supported by the law and evidence. *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956, *review denied*, 142 Wn.2d 1004 (2000). "[I]n evaluating whether the evidence is sufficient to support such a jury instruction, the trial court must interpret the evidence most strongly in favor of the defendant." *State v. Ginn*, 128 Wn. App. 872, 878-79, 117 P.3d 1155 (2005).

The trial court made four decisions that, taken together, unconstitutionally burdened Ms. Yokel's right to present a defense. First, the court denied Ms. Yokel's request to have her daughter testify about how Ms. Yokel came to possess the hydrocodone pill found in her pocket. RP2 10. Second, the court ruled the daughter's prescription for hydrocodone inadmissible. RP2 17-18. Third, the court barred any mention of the prescription during both direct and cross examination. RP2 17-18. And fourth, the trial court refused to give WPIC 52.02, the instruction that would have authorized the jury to consider Ms. Yokel's valid-prescription defense. RP2 173-74.

Taken together, the trial court's decisions unconstitutionally burdened Ms. Yokel's right to present two defenses: first, that the hydrocodone pill in her pocket was obtained pursuant to a valid prescription; and second, that her possession of it was unwitting.

a. Ms. Yokel was entitled to introduce evidence that the hydrocodone found in her pocket was obtained pursuant to a valid prescription

The statute under which Ms. Yokel was charged, RCW 69.50.4013(1), provides:

> It is unlawful for any person to possess a controlled substance *unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice,* or except as otherwise authorized by this chapter.

RCW 69.50.4013(1) (emphasis added).

To prove a violation of RCW 69.50.4013(1), the state must prove beyond a reasonable doubt that the defendant (1) possessed (2) a controlled substance. *State v. Hathaway*, 161 Wn. App. 634, 649, 251 P.3d 253 (2011). However, an accused is *not guilty* of violating RCW 69.50.4013(1) if he or she demonstrates by a preponderance of the evidence one of two propositions: (1) "the substance was obtained … pursuant to … a valid prescription … of a practitioner"; or (2) his or her possession was "otherwise authorized by this chapter." *See State v. Brown*,

33 Wn. App. 843, 848, 658 P.2d 44 (1983) (discussing valid-prescription defense and burden shifting under controlled substances possession statute).

Under RCW 69.50.4013(1)'s express terms, Ms. Yokel had a right to present evidence that the substance in her possession "was obtained … pursuant to … a valid prescription … of a practitioner." The evidence she planned to present fit comfortably into this framework: She planned to show—through both her and her daughter's testimony and by introducing the prescription—that the pill in her pocket "was obtained" pursuant to her minor daughter's valid prescription, and that she had it in her pocket as a result of helping administer medications to her daughter.

Nonetheless, the state and the trial court appear to have believed that the exception in RCW 69.50.4013(1) means more than it says. Throughout this case, the state argued—without referring to any specific statutory terms—that the exception simply does not apply when the person in possession of the substance is not the same person named in the prescription. For example, it asserted that "[i]t's not a defense [under the Uniform Controlled Substances Act] … to have a prescription *for someone else*." RP2 15.[4]

[4] The state also suggested that the applicability of the defense depended on the availability of a particular witness, namely, Ms. Yokel's daughter. RP2 15 ("It's not a defense … to have a prescription for someone else, *especially when this someone else*

But RCW 69.50.4013(1) does not condition the availability of the valid-prescription defense on who is named in the prescription. If the legislature intended to create that rule it could have worded the exception differently. It could have said:

> It is unlawful for any person to possess a controlled substance *unless that person has obtained a valid prescription directly from a practitioner acting in the course of his or her professional practice*, or except as authorized by this chapter.

However, the legislature did not say that. Instead, it phrased the exception in the passive voice and studiously avoided expressing both who must obtain the prescription and in whose name the prescription must be written. Therefore, by its terms, all that is required to benefit from the defense is to show that the substance "*was obtained* … pursuant to … *a valid prescription*." RCW 69.50.4013(1) (emphasis added).

The open-textured wording found in RCW 69.50.4013(1)'s exception makes sense. As the legislature appears to have recognized, individuals regularly possess controlled substances they are not authorized to ingest. For example, people often must possess controlled substances when taking care of their children, other family members, and their pets. It

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won't be here."). Nothing in RCW 69.50.4013(1) suggests the legislature intended to condition this defense on the availability of a particular witness.

would be senseless to criminalize routine acts of familial or veterinary caregiving.[5]

Despite these problems, the trial court adopted the state's proposed reading of RCW 69.50.4013(1). Without citing to any specific statutory terms or to case law, it limited the defense in RCW 69.50.4013(1) to the accused's own prescriptions. And it concluded that testimony or evidence that the medicine in Ms. Yokel's possession "was obtained … pursuant to … a valid prescription"—namely, her daughter's—would be irrelevant to the case, and therefore was inadmissible. RP2 17-18.

Later, the court acknowledged that the defense *might* apply to family members in possession of controlled substances prescribed to their minor children, but only under certain circumstances: (1) if the parent was in the process of giving the medication to the child, and was near the child; (2) if the medicine was still in the bottle; (3) if the person charged with possession of a controlled substance was not associated with other

[5] The defense as worded in RCW 69.50.4013(1) is the only statutory language at issue here. The valid-prescription defense that Ms. Yokel raised is separate from the "authorized by this chapter" defense. *See* RCW 69.50.4013(1) (using the disjunctive "or" between the two defenses). However, other sections of the Uniform Controlled Substances Act contemplate that household members may legally possess controlled substances prescribed to other people. *See* RCW 69.50.308 (authorizing practitioners to dispense controlled substances to "ultimate users," which include household members of the person whose name appears on the prescription; RCW 69.50.101(ss) (defining "ultimate user"). The valid-prescription defense in RCW 69.50.4013(1), however, is worded more broadly than the regulatory requirements outlined in the remainder of the statute. *See, e.g.*, RCW 69.50.309 (suggesting that, for possession to be lawful, the person to whom a controlled substance is dispensed must keep it in its original container).

illegal drug users. RP2 17-18. At one point the trial court even suggested that the applicability of the defense might depend on how police officers approached the suspect. RP2 17-18 (suggesting it might allow the defense if the police "broke down the door" as Ms. Yokel was handing medicine to her daughter).[6] But these unworkable, tacked-on conditions appear nowhere in RCW 69.50.4013(1), or in related case law.

In sum, RCW 69.50.4013(1)'s words are clear. Going by those words, there was no reason to exclude Ms. Yokel's daughter's testimony about how her prescribed hydrocodone pill got into her mother's pocket. Similarly, there was no basis to exclude the prescription itself, Ms. Yokel's own testimony about the prescription, or how she obtained the medicine. Had Ms. Yokel been allowed to develop evidence about the pill's origin, she would have surely been entitled to have the court instruct the jury about her valid-prescription defense. Accordingly, the trial court's decisions to exclude relevant evidence and not to give Ms. Yokel's requested instruction collectively violated her state and federal constitutional right to present a complete defense.

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[6] The trial court appears to have based its decision about the availability of the defense on its belief that Ms. Yokel was involved in illicit drug-activities in the motel room. *See* RP2 17-18 (pre-judging that Ms. Yokel had possessed methamphetamine). This is not a relevant consideration. In any event, the jury found Ms. Yokel not guilty of possessing methamphetamine. CP 4.

b. The trial court's refusal to admit evidence about the origin of the hydrocodone found in Ms. Yokel's pocket also crippled her unwitting possession defense.

The trial court's erroneous decisions to exclude evidence about the pill's origin *also* prevented Ms. Yokel from presenting a complete defense that her possession of hydrocodone was unwitting.

The court gave the following instruction relating to unwitting possession:

> It is a defense to count 2 only, possession of a controlled substance – Hydrocodone, that the possession was unwitting. A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in her possession or did not know the nature of the substance.
>
> The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not.

Supp. DCP, Court's Instructions to the Jury, Instruction No. 9 (sub. nom. 40).

However, the jury was unable to fully consider that defense because the trial court barred Ms. Yokel from presenting evidence or testimony about how the pill ended up in her pocket. Had Ms. Yokel or her daughter been able to testify about these facts, they would have said that Ms. Yokel was helping her daughter administer medications and that

she took an extra pill out of the container. *See* RP2 6-9. When she realized her daughter should not have the second pill, she put it in her pocket. *Id.*

This story might not be believable to the prosecutor or the court (who, unlike the jury, were convinced Ms. Yokel was involved in illicit drug activities in the motel room), but it nonetheless provides sufficient evidence for a jury to conclude that Ms. Yokel's possession of the pill was inadvertent or unwitting at the time police officers found it. This is especially true given that the jury in this case acquitted her of the other possession charge and was therefore unconvinced about Ms. Yokel's connection with drug activities going on the motel room.

Without evidence about how Ms. Yokel obtained the pill found in her pocket, Ms. Yokel was limited to arguing that she did not know the nature of the substance. This defense is dramatically weaker than the one she would have been able to present if the trial court had allowed her to fully develop the relevant facts.[7]

Had Ms. Yokel been allowed to fully establish the facts, the jury could have inferred that she did not know the controlled substance was in her possession until the police officers found it, reminding her it was there.

[7] Relevant facts include when she had last helped her daughter with medications, how long the pill was in her pocket, and whether she remembered she had put it there. Given the trial court's bar on discussion of the prescription and how Ms. Yokel obtained the medicine, she was unable to testify about these highly relevant aspects of her unwitting possession defense.

For this reason, the trial court also unconstitutionally burdened Ms. Yokel's right to present an unwitting possession defense.

2. The prosecutor committed misconduct during closing arguments.

A defendant is entitled to prevail on a claim of prosecutorial misconduct if he or she shows that the prosecutor's conduct was both improper and prejudicial. *In re Glasmann*, 175 Wn. 2d 696, 704, 286 P.3d 673, 678 (2012). To show prejudice, the defendant show a substantial likelihood that the misconduct affected the jury verdict. *Id.* In this case, because Ms. Yokel did not object, she must establish that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice. *Id.*

The prosecutor's closing argument unfairly exacerbated problems related to Ms. Yokel's inability to present a complete defense. Given that the prosecutor knew that Ms. Yokel could not talk about how she obtained possession of her daughter's medication, it was flagrant and ill-intentioned misconduct for the prosecutor to ask the jury to infer guilt based on the absence of such an explanation. A curative instruction would not have been sufficient in this context: Such an instruction could not have been effective without discussing Ms. Yokel's daughter's prescription, how she

obtained the medicine, and other evidence that was not in the record because of the trial court's erroneous exclusion orders.

3. The community custody condition prohibiting Ms. Yokel from possessing or consuming "non-prescribed mood altering substances" must be stricken because it is not crime related and is unconstitutionally vague.

a. The prohibition is not crime related.

RCW 9.94B.050(5)(e) allows sentencing courts to impose "crime-related prohibitions" as part of community custody. But mere imposition of a condition of community custody does not make it a valid crime related condition. *State v. Zimmer*, 146 Wn. App. 405, 413-14, 190 P.3d 121 (2008). In *Zimmer*, this Court held that a prohibition on possession of a cellular phone and an "electronic data storage device" was not a crime related prohibition because there was no evidence in the record indicating that the defendant used such a device in committing the crime. *Zimmer*, 146 Wn. App. at 413-14. To be crime related, an order prohibiting conduct must *directly* relate to the circumstances of the crime. *State v. Autrey*, 136 Wn. App. 460, 150 P.3d 580 (2006).

Ms. Yokel is prohibited from possessing or consuming "non-prescribed mood altering substances." This category is so broad that even common grocery items such as coffee, tea, sugar, canned whipped cream, and cigarettes could easily fall within it. It is difficult to imagine how

prohibiting these items could be directly related to possession of a prescription hydrocodone tablet. For that reason, the non-prescribed mood-altering substance prohibition is not a "crime-related" prohibition under RCW 9.94B.050(5)(e). It should be stricken.

b. The prohibition is unconstitutionally vague.

Under Article 1, Section 3 of the Washington Constitution[8], and the Fourteenth Amendment of United States Constitution, "a statute is void for vagueness if its terms are 'so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'" *State v. Worrell*, 111 Wn.2d 537, 540, 761 P.2d 56 (1988) (quoting *Myrick v. Board of Pierce Cy. Comm'rs*, 102 Wn.2d 698, 707, 677 P.2d 140 (1984)). This rule applies equally to conditions of community custody, *State v. Simpson*, 136 Wn. App. 812, 150 P.3d 1167 (2007), which have the effect of a criminal statute in that their violation can result in a new term of incarceration.

As the Washington Supreme Court explained, the test for vagueness rests on two key requirements: (1) adequate notice to citizens; and (2) adequate standards to prevent arbitrary enforcement. *State v. Aver*, 109 Wn.2d 303, 308-09, 745 P.2d 479 (1987). In addition, there are two types of vagueness challenges: (1) facial challenges, and (2) challenges as

[8] Article 1, section 3, of the Washington Constitution provides: "No person shall be deprived of life, liberty, or property, without due process of law."

applied in a particular case. *Worrell*, 111 Wn.2d at 540. In *Aver*, the court explained the former challenge:

> In a constitutional challenge a statute is presumed constitutional unless its unconstitutionality appears beyond a reasonable doubt. *Seattle v. Shepherd*, 93 Wn.2d 861, 865, 613 P.2d 1158 (1980); [*State v.*] *Maciolek*, [101 Wn.2d 259, 263, 676 P.2d 996 (1984)]. In a facial challenge, as here, we look to the face of the enactment to determine whether any conviction based thereon could be upheld. *Shepherd,* at 865. A statute is not facially vague if it is susceptible to a constitutional interpretation. *State v. Miller*, 103 Wn.2d 792, 794, 698 P.2d 554 (1985). The burden of proving impermissible vagueness is on the party challenging the statute's constitutionality. *Shepherd*, at 865. Impossible standards of specificity are not required. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 465, 722 P.2d 808 (1986).

109 Wn.2d at 306-07. "Vagueness challenges to conditions of community custody may be raised for the first time on appeal." *State v. Bahl*, 164 Wn. 2d 739, 745, 193 P.3d 678, 681 (2008).

As noted previously, the trial court imposed a community custody condition prohibiting Ms. Yokel from possessing or consuming "non-prescribed mood altering substances." CP 10. But that phrase is hopelessly vague. The word "substance" commonly refers to any kind of "material," though it sometimes also refers specifically to drugs. "substance," *Merriam-Webster.com*, 2015, http://www.merriam-webster.com (last visited Dec. 30, 2015). Food and drink are substances. The phrasal adjective "mood altering" is also vague. "Alter" means to change or make

different, and a "mood" is a predominant emotional state. "alter" and "mood," *Merriam-Webster.com*, 2015, http://www.merriam-webster.com (last visited Dec. 30, 2015). It follows that a "non-prescribed mood altering substance" could refer to common mood-changing items like coffee, tea, sugar, herbs, supplements, or vitamins. *See* "Vitamins and Supplements Lifestyle Guide," *WebMD*, http://www.webmd.com/vitamins-and-supplements/lifestyle-guide-11/herbs-vitamins-and-supplements-used-to-enhance-mood (last visited Dec. 30, 2015) (discussing mood enhancing properties of vitamins, herbs, and food supplements).

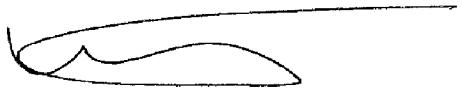
In short, the phrase "non-prescription mood altering substance" is so vague as to leave Ms. Yokel open to violation at the whim of her probation officer. Consequently, this condition is void and violates the defendant's right to due process under Article 1, Section 3, of the Washington Constitution, and the Fourteenth Amendment to the United States Constitution.

E. CONCLUSION

For the reasons explained above, Ms. Yokel was denied her constitutional right to present a defense and is entitled to a new trial. She is also entitled to a new trial based on prosecutorial misconduct during closing argument. Finally, the community custody condition prohibiting

her from possessing or consuming non-prescribed mood altering substances must be stricken. This Court should therefore reverse the judgment and sentence.

Respectfully submitted December 30, 2015.



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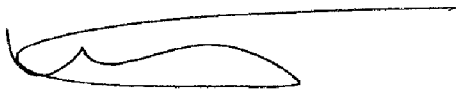
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Lewis County Prosecutor's Office, at appeals@lewiscountywa.gov and sara.beigh@lewiscountywa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Mary Yokel, 3128 Hemlock Street, Longview, WA 98532.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed December 30, 2015, in Winthrop, Washington.



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LISA E TABBUT LAW OFFICE

December 30, 2015 - 4:54 PM

Transmittal Letter

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